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Commonwealth of Pennsylvania

Report of the
Department of Fisheries

From December 1 : 1910

To November 30 : 1911



HARRISBURG:
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DEPARTMENT OF FISHERIES OF THE COMMON-
WEALTH OF PENNSYLVANIA.

Commissioner of Fisheries.

NATHAN R. BULLER, Office, Harrisburg.

Board of Fishery Commissioners.

JOHN HAMBERGER, Erie.

HENRY C. COX, Wellsboro.

W. A. LEISENRING, Mauch Chunk.

JOHN C. OGDEN, Johnstown.

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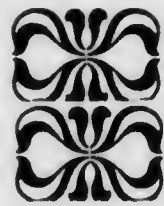
LETTER OF TRANSMITTAL.

Hon. John K. Tener, Governor of Pennsylvania, Harrisburg, Pa.

Sir: I have the honor to transmit the report of the Department of Fisheries for the year ending November 30, 1911.

Very respectfully,

NATHAN R. BULLER,
Commissioner.



REPORT
OF THE
BOARD OF FISHERY COMMISSION.

Hon. John K. Tener, Governor of Pennsylvania, Harrisburg, Pa.

Sir: The Board of Fishery Commission has the honor to herewith present its report of the operations of the Department for the year ending November 30, 1911.

As the members of the present Board received their appointment at your hands with commissions to run from September 1, 1911, when they came into office they found that the greater part of the operations of the Department for the year had been concluded, and for the work of the Department for the year preceding September 1st it was necessary to depend upon the reports of the Superintendents of the various hatcheries. These reports will be found embodied in the report of the Commissioner. The Board met for organization September 12, when all the members were present with the exception of Mr. Cox.

In accordance with the suggestion from yourself, it was decided that no further temporary work should be done at the hatcheries, but all work should be of a permanent character so as to be lasting, and if necessary the work should be concentrated upon a few of the hatcheries so as to complete them rather than distribute the work over them all, leaving each one incomplete. It was also decided in the interest of economy and success that the work of each hatchery be directed especially to the propagation of those fish for which its facilities were specially fitted, and that in the future, with the exception of the fish taken from the commercial catches, that the young fish be distributed of a larger size. The white fish, wall-eyed pike, blue pike, lake herring and shad are hatched from eggs that would go to waste but for the action of the State and National Governments in obtaining them from the fishermen and hatching them in the hatcheries. These fish are obtained in such large quantities that it would be impossible to hold them and they are therefore distributed and planted as soon as hatched.

The condition of the hatchery at Conneaut Lake was considered, and in view of the facts presented by the Commissioner, the Commission decided that no more money should be spent upon that hatchery as the drawbacks far outweighed any facilities that the hatchery might have. The shallowness of the ponds unfit it for bass



work, and while this shallowness might be overcome in a small degree there still would remain the difficulty of draining the ponds whenever there was high water. This was shown in the present year when an effort was made to drain the ponds in order to take an account of the stock fish.

September 10, the hatchery at Spruce Creek was visited by a cloud burst which completely flooded it, carrying away the hatching house and doing much damage to the ponds, washing out many of the fish. The destruction of the hatching house was so complete that it had to be taken down entirely. This flood is the most disastrous that has as yet visited this hatchery.

In the matter of pollution, it was decided that the best plan was to take up various sections seriatim, notifying all the manufactories on a certain stream that pollution must cease at a certain time. This promises to work much better in securing results than taking up sporadic cases where complaints are received. The problem of pollution is a very large one, but the Department finds that the majority of manufacturers are anxious to co-operate with the Department in bringing about the purification of the streams.

The work of the Department in controlling the pollution and enforcing the fish laws is greatly hampered by the fact that under the appropriation made by the Legislature it is only possible to appoint 10 wardens to cover the State. This gives each one of the wardens a very large territory, and of course the work cannot be as efficiently done as if it were possible to employ the whole 30 wardens authorized by law.

Very respectfully,

J. C. OGDEN,
W. A. LEISENRING,
HENRY C. COX,
JOHN HAMBERGER.

REPORT OF COMMISSIONER.

Hon. John K. Tener, Governor of Pennsylvania, Harrisburg, Pa.

Sir: I have the honor to herewith submit my first report of the Department.

By your appointment I assumed charge of the Department of Fisheries September 1, 1911. As this was almost at the close of the Departmental year the work of distributing fish was about over, and the only thing on hand at the hatcheries was preparation for the taking of the trout eggs, the gathering of lake fish spawn in Lake Erie, and preparing the various ponds for winter.

A few days after taking my place, the hatchery at Spruce Creek was visited by a flood which left much damage in its trail. The large hatching house was undermined by the water so that it was necessary to take it down, while a large number of the fish were washed out from the ponds. The situation of this hatchery makes it liable to similar floods owing to the fact that the stream above is confined in a narrow valley for several miles so that any kind of a severe rainfall causes an exceedingly rapid rise in the stream which breaks out over the hatchery grounds as the first outlet.

Acting upon a suggestion from yourself that the plans in future should be so designed that nothing but work of a permanent character should be installed and an effort made to complete at least some of the hatcheries to their fullest capacity, after consultation with the Board of Fishery Commission, it was decided that only such work should be done at each hatchery as its facilities best fitted it for, and nothing of a temporary character, except in case of unexpected necessity.

An examination of the hatchery at Conneaut Lake in Crawford county disclosed the fact that it is seemingly unfitted for the purpose for which it was designed. The outlet of Conneaut Lake, which is dammed to furnish the water for the hatchery, cannot be raised any higher without flooding the properties above, causing claims for damages, and the result is that the ponds can only be flooded to a depth of two feet or a little over. While this is too shallow a condition to permit of good fish propagating conditions, there is another trouble due to the fact that in any raise in the water it is impossible to drain the ponds and drainage of the ponds is an essential part in fish culture. Experience has shown that such shallow water as there is at Conneaut Lake is not suitable for the culture of bass and the fishes the Crawford hatchery was designed for.

It had been suggested that a pipe line from the lake would enable the depth of water in the ponds to be increased, but an examination shows that this would not be more than two feet and there would

still remain the same trouble with the drainage. The water supply for the battery on several occasions has proven itself utterly unreliable, necessitating the reshipment of the eggs which entailed expense and a heavy loss of the eggs. The eggs for the battery were all shipped in from other places and could have been readily handled at the hatcheries from which they were shipped, so that there was nothing gained by maintaining the battery at Conneaut Lake, while there was a constant risk of the water supply giving out, and as remarked above, the eggs would have to be reshipped to another hatchery which always means a very heavy loss. In view of these conditions it was decided that the best policy would be to stop the expenditure of any more money at the Crawford hatchery and devote that money to other hatcheries where actual results can be obtained. In accordance with this view the hatchery at Conneaut Lake has been left in the care of a caretaker until the meeting of the next Legislature.

The announcement of the abandonment of the Crawford hatchery caused various protests to be filed by persons living in that section of the State. Affidavits were even furnished to the effect that since the establishment of the Crawford hatchery the muscallonge fishing had greatly improved in the Conneaut Lake.

Such affidavits show how largely imagination can enter into affairs. The records show that no muscallonge were ever planted in the State of Pennsylvania. One year there was a shipment received of 2,000 eggs at the Corry hatchery where they were hatched. The youthful cannibals devoured each other until there was only one left and he was taken by a Kingfisher.

The Department in its desire to meet the wishes of the fishermen has made arrangements with the New York Conservation Commission to procure some muscallonge eggs this season, which will be hatched and planted in Conneaut Lake and one or two other lakes where these fish inhabit. So fiercely cannibalistic are these fish that Dr. Tarleton H. Bean, the fish culturist of New York, when writing to the Department about the shipment of the muscallonge eggs, says he does not believe it is possible to raise them to a fingerling stage, unless each fish is kept in a separate compartment. The Department also hopes to supplement the supply of muscallonge for Conneaut Lake by obtaining the eggs of that fish next year from Canadian waters.

The Superintendent of the Crawford hatchery resigned shortly after my assumption of this office and turned over the property to the caretaker. From his record books for 1910 I am unable to find that he made any shipments of fish whatever from the hatchery during the year.

By an arrangement with the Michigan Fish Commission and the Wisconsin Fish Commission, the Department will receive lake trout eggs for stocking the inland lakes, the Department being unable to collect any eggs from Lake Erie or to obtain any as heretofore from the United States Authorities, with the exception of one hundred thousand.

Owing to the stormy weather which prevailed on Lake Erie during the spawn taking time for white fish and herring there was quite a falling off in the number of eggs taken, but fortunately the Department had made arrangements with the Canadian authorities for a supply of white fish eggs and the number received from

the Canadian ports was quite gratifying when compared with the number of eggs that the United States and other States were able to get from Lake Erie during the past season.

From the reports of the Superintendents of the various hatcheries, except the Crawford hatchery, which is spoken of above, I find the number of fish distributed during the year to be as follows:

DISTRIBUTION OF FISH.

| | |
|---|-------------|
| White fish, | 73,481,900 |
| Lake herring, | 16,070,000 |
| Wall-eyed pike, | 52,672,500 |
| Yellow perch, fry, | 324,720,000 |
| Yellow perch, fingerlings, | 13,350 |
| Yellow perch, adults, | 3,150 |
| Rock bass, yearlings, | 300 |
| Rock bass, adults, | 200 |
| Calico bass, yearlings, | 100 |
| Calico bass, adults, | 395 |
| Sunfish, yearlings, | 53,500 |
| Tadpoles, | 41,000 |
| Blue pike, | 76,300,000 |
| Brook trout, fingerlings, | 12,619,600 |
| Brook trout, adults, | 1,500 |
| Brown trout, fingerlings, | 225,600 |
| Rainbow trout, fingerlings, | 234,000 |
| Rainbow trout, adults, | 1,500 |
| Blue gill sunfish, adults, | 350 |
| Catfish, adults, | 53,672 |
| Small mouth black bass, adults, | 103 |
| Small mouth black bass, advanced fry, | 37,500 |
| Shad fry, | 7,520,000 |
| Large mouth black bass, adults, | 173 |
| Sturgeons, adults, | 4 |
| Silver side salmon, one year old, | 12,000 |
| Silver side salmon, advanced fry, | 60,000 |
| Variety of adult and fingerling fish for Philadelphia Aquarium, | 4,029 |
| Total, | 564,120,426 |

FINANCIAL STATEMENT.

The following is a statement of the receipts and expenditures of the Department of Fisheries for the year ending November 30, 1911:

| | | | |
|---|-------------|-------------|-------------|
| HATCHERIES. | | | |
| Received from State Treasurer, | \$38,672 12 | | |
| Balance on hand December 1, 1910, | 594 78 | | |
| | | \$39,266 90 | |
| Paid for hatcheries, | | | \$38,672 12 |
| Balance on hand November 30, 1911, | | | \$594 78 |
| WARDENS. | | | |
| Received from State Treasurer, | \$13,603 77 | | |
| Balance on hand December 1, 1910, | 49 23 | | |
| | | \$13,653 00 | |
| Paid wardens, | | | \$13,603 77 |
| Balance on hand November 30, 1911, | | | 49 23 |
| CONTINGENT FUND. | | | |
| Received from State Treasurer, | \$1,000 00 | | |
| Balance on hand December 1, 1910, | 72 63 | | |
| | | \$1,072 63 | |
| Paid for contingent expenses, | | | \$897 00 |
| Balance on hand November 30, 1911, | | | \$174 94 |
| EXPENSES OF FISHERIES COMMISSION. | | | |
| Received from State Treasurer, | \$1,026 93 | | |
| Paid for expenses, | | | \$1,026 93 |
| COUNSEL FEES AND COURT EXPENSES. | | | |
| Received from State Treasurer, | \$842 91 | | |
| Paid for fees and expenses, | | | \$842 91 |
| OPERATION OF COMMODORE PERRY. | | | |
| Received from State Treasurer, | \$3,407 24 | | |
| Paid for operation, | | | \$3,407 24 |
| COMPLETING HATCHERIES. | | | |
| Received from State Treasurer, | \$4,443 29 | | |
| Paid for work, | | | \$4,443 29 |
| FIELD WORK. | | | |
| Received from State Treasurer, | \$1,920 66 | | |
| Paid for work, | | | \$1,920 66 |
| PURCHASE OF GROUND AT ERIE. | | | |
| Received from State Treasurer, | \$28 00 | | |
| Paid, | | | \$28 00 |
| ERECTION OF FISHWAYS. | | | |
| Received from State Treasurer, | \$2,050 00 | | |
| Paid for fishway, | | | \$2,050 00 |
| BUILDING WALLS AT CRAWFORD HATCHERY. | | | |
| Received from State Treasurer, | \$1,383 51 | | |
| Paid for work, | | | \$1,383 51 |

During the year there were receipts from various sources as follows, the same being paid into the State Treasury daily in accordance with the statute.

| | |
|---|-------------------|
| License fees for commercial hatcheries, | \$140 00 |
| License fees for eel baskets, | 381 90 |
| License fees for shad seines, | 74 60 |
| Lake Erie licenses, | 1,950 00 |
| Confiscated fish and devices sold, | 10 00 |
| Fines for violation of the fish laws, | 2,321 36 |
| Property sold, | 48 25 |
| | \$4,926 11 |

REPORT OF THE

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DEPARTMENT OF FISHERIES.

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ITEMIZED EXPENSES OF HATCHERIES.

The following is the itemized account of the expenses of the various hatcheries for the year ending November 30, 1911.

| | Salaries. | Labor. | Travel. | Material. | Food. | Incidentals. | Water rent. | Total. |
|------------------------|-------------|------------|------------|------------|------------|--------------|-------------|-------------|
| Belleville, | \$3,165 00 | \$516 36 | \$416 82 | \$1,353 56 | \$1,564 63 | \$351 14 | ----- | \$7,208 11 |
| Corry, | 3,445 00 | 48 04 | 416 33 | 413 19 | 1,140 11 | 425 57 | ----- | 5,888 24 |
| Crawford, | 2,663 33 | 33 00 | 236 85 | 213 54 | 122 15 | 592 30 | ----- | 3,886 17 |
| Erie, | 2,063 00 | 723 60 | 225 38 | 122 57 | ----- | 170 73 | \$400 00 | 3,647 28 |
| Erie, Auxiliary, | 2,803 00 | 75 85 | 237 04 | 271 04 | 147 35 | 624 48 | ----- | 4,160 76 |
| Spruce Creek, | 2,687 00 | 61 71 | 633 69 | 428 08 | 1,019 47 | 561 46 | ----- | 5,291 41 |
| Torresdale, | 2,630 00 | 284 25 | 306 52 | 304 86 | 41 73 | 956 49 | ----- | 4,533 85 |
| Wayne, | 1,918 00 | 167 41 | 374 27 | 504 46 | 427 64 | 454 52 | ----- | 3,546 30 |
| Total, | \$21,318 93 | \$1,930 22 | \$2,906 90 | \$3,616 30 | \$4,463 08 | \$1,033 09 | \$400 00 | \$38,672 12 |

In the incidental expenses of Torresdale is included the item of \$572.14 for electric light.

SHAD SEINE LICENSES.

During the year 22 licenses were granted for seines for taking shad, herring or alewife between March 1st and June 10th, the latter date being extended by the last Legislature to the 20th. Under the law other food fish taken in these seines can be kept. The following is the table showing the take:

| County. | Number of license. | Shad. | | Carp. | | Suckers and Mulletts. | | Catfish. | |
|------------------|--------------------|---------|------------|---------|----------|-----------------------|---------|----------|---------|
| | | Number. | Value. | Pounds. | Value. | Number. | Value. | Pounds. | Value. |
| Dauphin, | 4 | ----- | ----- | 325 | \$29 89 | 161 | \$13 83 | ----- | ----- |
| Delaware, | 1 | 8 | \$4 00 | 352 | 28 16 | 150 | 10 50 | 175 | \$10 50 |
| Lancaster, | 6 | 12,701 | 1,266 90 | 300 | 15 00 | ----- | ----- | ----- | ----- |
| Mifflin, | 6 | ----- | ----- | 820 | 61 42 | ----- | ----- | ----- | ----- |
| Perry, | 1 | ----- | ----- | 100 | 5 00 | ----- | ----- | ----- | ----- |
| York, | 4 | 9,816 | 2,381 93 | 340 | 16 50 | ----- | ----- | ----- | ----- |
| Total, | 22 | 22,525 | \$3,652 83 | 2,137 | \$155 97 | 211 | \$24 33 | 175 | \$10 50 |

COMMERCIAL FISH HATCHERIES.

The number of licenses issued for commercial fish hatcheries during the year was 14. The following is a statement of the business done by the concerns:

| Name. | Pounds. | Number. | Value. |
|----------------------------------|---------|------------|-------------|
| Dead trout for market, | 38,756 | ----- | \$24,331 88 |
| Trout, live, mature, | ----- | 62,951 | 5,001 19 |
| Brook trout, fingerlings, | ----- | 63,420 | 1,608 37 |
| Brook trout, advanced fry, | ----- | 178,500 | 525 50 |
| Brook trout, eyed eggs, | ----- | 15,063,459 | 7,147 64 |
| Brook trout, green eggs, | ----- | 1,300,000 | 325 00 |
| Black bass fry, | ----- | 10,000 | 141 00 |
| Blue gill sunfish, | ----- | 3,600 | 157 50 |
| Gold fish, | ----- | 11,370 | \$34 24 |
| Black bass, yearlings, | ----- | 250 | 50 00 |
| Total, | 38,756 | 16,693,550 | \$30,222 82 |

VIOLATION OF FISH LAW.

The number of arrests made from December 1, 1910, to November 30, 1911, 248.

Amount of fines collected for violations of the fish laws, \$2,321.36.

The following was the nature of violations:

| | |
|--|-----|
| Dynamiting fish, | 12 |
| Fishing with gill net, | 1 |
| Fishing with seine net, | 2 |
| Fishing illegal dip nets, | 5 |
| Fishing illegal fyke nets, | 1 |
| Fishing with nets in trout streams, | 10 |
| Fishing with spears in trout streams, | 5 |
| Spearing fish out of season, | 3 |
| Selling trout, | 2 |
| Taking short trout, | 6 |
| Taking short bass, | 12 |
| Taking short pickerel, | 3 |
| Taking game fish out of season, | 12 |
| Fishing with trammel nets, | 3 |
| Fishing with lay-out lines, | 15 |
| Snaring fish, | 12 |
| Taking fish with the hands, | 3 |
| Fishing nets within 400 feet of dams, | 68 |
| Shooting fish, | 2 |
| Taking shad out of season, | 2 |
| Drawing off waters for fishing purposes, | 3 |
| Fishing on Sunday, | 7 |
| Illegal fish baskets, | 5 |
| Pollution of streams, | 29 |
| Robbing fish nets, | 2 |
| Interfering with officers, | 2 |
| Using illegal devices not specified, | 21 |
| Total, | 248 |

EEL INDUSTRY.

The past season was rather a non-successful one for the licensees of eel baskets, owing to the fact that the water was high in the streams most of the time, and numerous complaints are made by the holders of licenses that their baskets were washed out by high water before they succeeded in getting any eels.

It will be noticed that the largest catches, and the largest eels, were taken in the northern counties, near to the headwaters of the river. In Bradford county the average weight of the eels was over

a pound, while in a number of other counties the average was very much less, and in numerous instances the reports show that it took ten or twelve eels to weigh a pound.

The total weight of eels taken was 99,711 pounds, valued at \$9,164.18. There were 458 licenses issued, of which 133 caught nothing.

| Counties. | Fels. | | | Suckers and Mulletts. | | | Carp. | | | Licenses issued. | Caught nothing. |
|-----------------------|---------|---------|------------|-----------------------|---------|--------|---------|---------|--------|------------------|-----------------|
| | Number. | Weight. | Value. | Number. | Weight. | Value. | Number. | Weight. | Value. | | |
| Adams, | 42 | 42 | 2.21 | 28 | 18 | 1.40 | | | | 3 | 11 |
| Bedford, | 818 | 98 | 9.76 | | | | | | | 17 | 1 |
| Berks, | | | | 107 | 82 | 6.06 | 38 | 59 | 5.55 | 29 | 4 |
| Bradford, | 41,337 | 47,805 | 4,508.38 | | | | | | | 1 | 1 |
| Bucks, | | | | 15 | 18 | 1.80 | | | | 5 | 2 |
| Centre, | 83 | 107 | 12.60 | 141 | 60 | 5.80 | | | | 10 | 4 |
| Chester, | 267 | 332 | 30.20 | | | | | | | 1 | 1 |
| Clinton, | 150 | 110 | 11.00 | 65 | 37 | 3.70 | | | | 8 | |
| Columbia, | 377 | 478 | 52.75 | 133 | 150 | 6.80 | 2 | 12 | .00 | 3 | 3 |
| Cumberland, | 701 | 670 | 73.00 | 40 | 30 | 2.00 | 20 | 40 | 1.00 | 7 | 3 |
| Dauphin, | 1,540 | 1,041 | 109.63 | 85 | 33 | 2.30 | | | | 25 | 6 |
| Franklin, | 12,158 | 5,585 | 545.19 | 584 | 304 | 17.97 | 29 | 54 | 3.88 | 54 | 22 |
| Huntingdon, | 91 | 209 | 20.90 | 3 | 5 | 3.00 | | | | 4 | 1 |
| Juniata, | 1,211 | 596 | 62.03 | 61 | 37 | 2.50 | 10 | 23 | 1.91 | 24 | 11 |
| Lackawanna, | 1,097 | 392 | 31.52 | 2 | 3 | 1.00 | | | | 20 | 10 |
| Lebanon, | 7,945 | 6,060 | 60.60 | | | | | | | 2 | 2 |
| Lecombe, | 2,113 | 1,709 | 190.38 | 214 | 107 | 4.70 | | | | 29 | 10 |
| Luzerne, | 18 | 14 | 1.40 | | | | | | | 1 | |
| Manaster, | 13,300 | 13,014 | 1,385.55 | 333 | 281 | 16.26 | 182 | 390 | 25.05 | 30 | 7 |
| Mifflin, | 5,811 | 3,925 | 336.89 | 3,896 | 2,821 | 132.64 | 382 | 2,920 | 40.75 | 45 | 10 |
| Montour, | 5,365 | 1,617 | 106.16 | 32 | 18 | 1.15 | 24 | 47 | 2.60 | 19 | 6 |
| Northumberland, | | | | | | | | | | 1 | 1 |
| Perry, | 6,128 | 4,747 | 471.92 | 220 | 159 | 12.04 | 11 | 50 | 4.00 | 58 | 9 |
| Snyder, | 5,224 | 2,761 | 218.64 | 359 | 341 | 16.00 | 20 | 194 | 10.31 | 27 | 2 |
| Susquehanna, | 794 | 545 | 49.63 | 48 | 29 | 2.53 | | | | 12 | 2 |
| Tioga, | 98 | 100 | 10.00 | | | | | | | 1 | |
| Union, | 217 | 514 | 47.80 | 35 | 10 | 5.00 | | | | 7 | 4 |
| Wyoming, | 1,552 | 899 | 89.53 | 109 | 47 | 2.64 | | | | 1 | |
| York, | 7,225 | 6,094 | 627.40 | 28 | 30 | 3.00 | 1 | 3 | 25 | 4 | 1 |
| | 475 | 276 | 29.31 | 1 | 1 | .05 | 10 | 8 | 80 | 7 | 2 |
| Total, | 116,308 | 99,711 | \$9,164.18 | 6,469 | 4,627 | 242.84 | 729 | 3,710 | 97.60 | 458 | 133 |

PHILADELPHIA AQUARIUM.

The Legislature, by an Act approved April 22, 1905, authorized the loaning of a number of tanks used by the Department of Fisheries in its exhibit at the Louisiana Purchase Exhibition in St. Louis to the city of Philadelphia for Aquarium purposes. During the past summer the city of Philadelphia authorized the establishment of an Aquarium at the Fairmount Water Works and the tanks have been installed there. The above Act also authorizes the Commissioner of Fisheries to supply the Aquarium from time to time with specimens of Pennsylvania fish. There seems to be nothing more interesting to the public than the studying of fish life in an Aquarium, and wherever one has been established it has been the attractor of crowds. The Department desires most heartily to co-operate with the city of Philadelphia in making this Aquarium a success and has already done much to aid it. From the Torresdale hatchery alone it has furnished 4,029 specimens of adult and fingerling fish for exhibit purposes, and a number of trout and other fish were sent from the Spruce Creek hatchery for the same end.

Very respectfully,

N. R. BULLER,
Commissioner.

COURT DECISIONS.

The following are the opinions delivered through the year on fish cases:

NETTING IN TROUT STREAMS.

Five men were arrested in Schuylkill county for fishing in a trout stream with a net. They were found guilty by the Justice of the Peace and sentenced to pay fines of \$20 and costs. From this decision the defendants appealed to the Court of Quarter Sessions of Schuylkill County. The court on hearing the appeal decided that two of the men should be discharged, but sustained the verdict of the Justice in the case of the other three men, who not paying the fines were sent to jail for 20 days each. The following is the opinion of the court:

IN THE COURT OF QUARTER SESSIONS OF THE PEACE IN AND FOR THE COUNTY OF SCHUYLKILL.

| | | |
|---|---|--|
| Commonwealth | } | Summary conviction before Francis S. Freiler, J. P. |
| v. | | |
| Charles Yeich, Robert Ney, John Yeich, Samuel Yeich, and Henry Emerich. | | |

OPINION OF THE COURT.

Shay, P. J.

This was a summary conviction under the Act of May 1, 1909, P. L. 353, in an action brought by C. R. Holland, special officer of the State Fishery Department, against the above-named defendants for fishing in a trout stream with a net. The justice adjudged all the defendants guilty and fined each one twenty dollars and costs, under the provisions of the said act. An appeal was thereupon taken out to the Court of Quarter Sessions, and the court heard the evidence pro and con.

The practice on an appeal from a summary conviction is well established. There is no trial by jury, as is conclusively and clearly decided in *Van Swartow vs. Commonwealth*, 24 Pa. 131, *Byers vs. Commonwealth*, 42, 89, *Commonwealth vs. Waldman*, 140 Pa., 89, and *Commonwealth vs. Hippy*, 20 Dist. Rep., page 390, May 8, 1911. The

Court, on an appeal, is to hear the evidence and decide whether the justice was justified in his findings and his action. We have heard the evidence in this case, and find from the justice's return that the evidence before him was as follows:

Holland, the State officer, testified that he was ordered to investigate the above case; that he visited the place, and that Anthony Yeich and Mrs. Anthony Yeich informed him that Robert Ney and Henry Emerich were her sons, and that her sons were not the only ones that did the fishing.

Anthony Yeich and Mrs. Anthony Yeich, the father and mother of the three defendants of the same name, testified, the father saying that he was in bed and knew nothing of the fishing. Mrs. Yeich testified that she was in bed, and knew nothing of the fishing, and that it made no difference what she said to the officer at the farm, as she was not under oath.

David Metz, a witness, testified that he saw the fish on the porch of the Yeichs, and there were some trout, but he could not remember how long ago it was.

S. Hogan, the constable who made the arrest, testified that one of the Yeich boys showed him the creek they fished in, and called it Bear Creek, situated in South Manheim township, Schuylkill county, Pennsylvania, and produced and showed him the net and explained how they fished with it, and put the net in evidence.

Upon the hearing before the Court all five defendants denied any knowledge of having fished in the stream, having caught any fish or having fished with a net—in fact, denied the whole accusation.

The prosecutor's testimony was simply, as to Ney and Emerich, that he had been told that they were present. Ney and Emerich emphatically denied this, and as to them we do not think the testimony sufficient to hold them.

The evidence as to the three Yeichs convinces us that the justice made no mistake in finding them guilty, and we are satisfied from the evidence, from the net produced, which the Yeichs testified was used to catch pigeons, and from all the testimony in the case, that they were rightly adjudged guilty.

And now, May 15th, 1911, the appeal as to Robert Ney and Henry Emerich is sustained, and the appeal is dismissed as to Charles Yeich, John Yeich, and Samuel, and the proceedings of the Justice, Francis S. Freiler, as to Charles Yeich, and Samuel Yeich, are directed to appear before the justice for execution of the sentence.

(Signed)

By the Court,

Same day, the defendants, Charles Yeich, John Yeich and Samuel Yeich, except to the above order and decree of the Court, and bill sealed for the defendants.

(Signed)

ARTHUR L. SHAY, P. J. (Seal)

FISHING IN DRAWN OFF WATERS.

Two persons were arrested in Chester county for taking fish from water left in a mill race, which had been drawn off for the winter. The fish, it was claimed by the defendants, were left in puddles and would have perished if not taken. A similar case was tried some years ago in Lehigh county and the Judge there in sustaining the conviction remarked that if fish could be taken from drawn off dams etc., the fashion of cleaning dams would become much more prevalent. The men were convicted by the Justice of the Peace, and appealed to the Court of Quarter Sessions of Chester county. This Court, after hearing the case discharged the defendants upon the ground that the waters from which the fish had been taken, could not be considered as waters under the fish protective act. From this decision, the Department took an appeal to the Superior Court. The following is the opinion of the Chester County Court:

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| Commonwealth | } | Court of Quarter Sessions of Chester |
| vs. | | county. |
| Edward Janower and Isidore Janower. | | Appeal by defendants from summary conviction. |

OPINION.

The Justice's transcript shows that the complaint, trial and judgment related exclusively to the taking of fish in an unlawful manner.

While the investigation here is de novo, it must be confined to the charge presented to and disposed of by the Justice. An essential ingredient of the offence charged is that the fish were taken by the defendants from "the waters of the Commonwealth."

The fish were taken, as we find from the evidence, from a large puddle of water, barely sufficient at the time to keep them alive, being the slight remnant of water left in the mill race of defendants' father after its connection with Hartman's run had been cut off, which puddle was a mere temporary evanescent harbor for the fish, which could not have sustained them for any substantial length of time.

The race was cut off from the stream because freezing weather had set in, and in accordance with the uniform practice of defendants' father to keep the race free of water during the winter. In our opinion the puddle in the race did not constitute within the meaning of the Act, "waters within the Commonwealth." The puddle and the fish in it were permanently separated, without fault or contrivance of the defendants, from what could justly be termed "waters."

The situation was the same as would be presented, if after a heavy freshet in a stream a few fish would be imprisoned in a bucket-full of water in some little depression, in a bordering meadow. Such casual, temporary, fugitive puddles may not properly be viewed as "waters," in any fair interpretation of a fish protective act.

Judgment is directed for the defendants.

W. BUTLER, Jr., A. L. J.

RESISTING AN OFFICER.

One of the strong provisions in the fish law is that which makes it a serious offense for any person to interfere with a fish warden who is arresting a violator of the law. The penalty is very severe, the fine being \$100 or a hundred days in jail. This severe sentence is deemed necessary from the fact in the past a number of wardens have been seriously maltreated by persons who interfered with them while in the course of their duties. Several of the wardens have been shot and others badly pounded up.

Last year while Warden Marcy was taking a prisoner in Lycoming county before a Justice from whom the warden had secured a warrant, a brother of the defendant made his appearance and in the exercise of his authority the warden arrested the man for interference. He was fined by the Justice of the Peace \$100, when he appealed to Court. The Court after hearing the testimony decided that the defendant was technically guilty, but thought that the fine was too severe for the offense. He therefore ordered that if the defendant would pay all the costs within ten days he would allow the appeal. The case was settled on this basis.

The following is the opinion of the Court:

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| Commonwealth | } | In the Court of Common Pleas of |
| vs. | | Lycoming county. |
| GEORGE B. UPDEGRAFF. | | No. 298, Sept. T. 1910. |

The defendant, George B. Updegraff, was arrested on sight without warrant by a duly appointed and commissioned State "Fish Warden," and taken before Justice of the Peace Bardo where information on oath in due form was made by the Warden charging the defendant with violating the 25th section of the Act of May 1, 1909, P. L. 353, which provides that: "Any person or persons who shall by threat, menace, or in any manner attempt to deter or prevent any Fish Warden, or other person authorized to make arrest for violation of the fish laws, from enforcing or carrying into effect any provisions of this act shall on conviction thereof as provided in section twenty-seven of this act be subject to a penalty of one-hundred dollars, or in default of payment of said fine be committed to the county jail for a period of one hundred days."

The Fish Warden, on July 28, 1910, had made the arrest of Augustus Updegraff, a brother of the defendant, for violation of the fish law, upon a warrant duly issued to him by said Justice of the Peace Bardo of the Borough of Montgomery in this county, and it was whilst this prisoner was in custody and with reference to this arrest that the alleged "threat, menace or force" charged against George Updegraff the defendant is alleged to have been committed.

The defendant was taken before said Justice of the Peace Bardo, and after a hearing was convicted and sentenced as provided for in the act above referred to. The case is now before us on an appeal allowed from this conviction and sentence.

Testimony was fully heard before us on behalf of the Commonwealth and on behalf of the defendant, and all that transpired at the time and place of said arrest fully gone into on both sides, and it is from this evidence that we must reach our conclusions.

This Act of Assembly, new as it is, has received judicial interpretation in the case of *Commonwealth vs. Souder*, 7 Pa. Justices' Law Reporter, 282, in which Judge Swartz says: "The twenty-fifth section of the Act of May 1, 1909, P. L. 368, contemplates that the person making threats or using force against the officer shall do so knowing that the officer is engaged in enforcing the fish laws. The act punishes for interferences with a fish warden or for preventing the enforcement of the fish laws. The act does not impose a penalty for interference with every officer of the law."

There is no evidence that either shows or tends to show that the defendant had knowledge that Augustus Updegraff had violated the fish law or that he was under arrest for such offense for which he is charged is alleged to have been committed.

The evidence shows that the defendant is a resident of the City of Williamsport, a member of the firm of Updegraff & Burkhart, engaged at corner of Court and West 4th Sts., in the sporting goods business, with repair shops for bicycles, &c., in connection therewith. That he had been in ill health for some time prior to July 28, 1910, and had been advised by his physician to seek out of door exercise. That he and his wife had on the morning of that day gone by train to Montgomery. He there found his brother Augustus Updegraff and engaged him to procure for him some live bait with which he and his wife might engage at fishing at the Muncy Dam. That whilst he was engaged at fishing at the Dam with his wife with rod and line, his wife informed him that some persons had taken his brother Augustus from the Dam. That he then had his coat off and his sleeves rolled up as was his custom when so engaged. The north bank of the river at that place is so elevated as to shut off the view in the direction Augustus Updegraff was being taken from the Dam or place where the defendant then was, and upon being informed by his wife that somebody had taken Augustus, he started in the direction they were taking him and overtook them about 100 feet or thereabouts north of the river bank in the field headed towards Montgomery, when the following took place according to the testimony of Ira C. Stevenson of the State Constabulary, who was assisting Raymond Marcy, the fish warden, in making the arrest, who says: "After the warrant was read to him (Augustus Updegraff), and we were trying to get Gus to go along with us, I noticed George Updegraff, the defendant in this case, coming across the fields from the direction of the Dam and he hollered to us that we should take our hands off that man. We hadn't seen him do anything and we hadn't read any warrant to him. At the same time he had advanced in an excited manner. Mr. Marcy said to me, 'Can you handle this man while I look after this fellow that is coming?' I said, yes, I will take care of him. So it was only a second or so—a few seconds—until George B. Updegraff was at the scene where we were. Mr. Marcy told him to stop back there that he was a fish warden and that he would get into trouble if he interfered. He said, you have not seen him do anything, that he is not going with you until I know where he is going. He did not quit advancing until

Marcy grabbed him by the throat. He had his fist closed in a manner as though he was going to strike him (Marcy). Mr. Marcy had his jack in his hand and told him if he didn't put his hands down he would break his arm. Marcy then placed him under arrest."

The defendant testifying in his own behalf says: "I did not interfere with the arrest of my brother Gus at all. I just asked where they were going to take him to. They grabbed me when I walked up to them. I says to them to hold on, where are you going to take my brother to? I said I want to go his bail. When I walked up to him he had a billy in his hand. I said hold on put that down, don't hit me, and kind of threw up my hand so he would not hit me, and he grabbed me (illustrating, by the throat) I says, who are you? Show me your badge. He said I don't have to—The little fellow (Stevenson) showed his badge then."

Morrel Kift, a young man who was at the Dam fishing on that day and saw the defendant come up over the river bank and follow after his brother Augustus and the men having him in charge, and thus describes what he saw George Updegraff do: "These two men were going out with Gus and George Updegraff came up to them. He was going across there (meaning towards them) you wouldn't hardly call it running, and when he came up to them they grabbed hold of him and took him along."

He says he saw him walk across the field about 150 yards before he came to them; did not hear anything said; saw one of the men have a billy. Did not see Updegraff make a movement indicating an intention to resist or to do bodily harm.

Another young man by the name of Bardo was present with Kift and corroborates Kift in what he saw transpire between the officers and the defendant at the time the defendant came up to and was approaching them.

I have not referred to all the testimony for the Commonwealth or for the defendant, but to so much of the evidence as shows what occurred as viewed by the respective parties.

Whether what the defendant said and done can be construed into either a threat, menace or force, is the question we must first determine, and if so, did the defendant know the fish warden had arrested his brother for violating the fish laws.

It was perfectly legitimate for the defendant to have inquired of the cause of the arrest and to have remonstrated with the warden if he honestly believed the arrest was without lawful authority, so long as such inquiry or remonstrance was not accompanied with either threat, menace or force.

We are convinced that the defendant acted imprudently and allowed his indignation at the arrest of his brother to show itself in a manner that the fish warden had a right to draw an inference therefrom that he meant to interfere with the arrest of his brother for violating the fish law. We are equally convinced, however, that imprudent haste on the part of the fish warden and his combative attitude upon the approach of the defendant had a great deal to do with the temper and resentment manifested by the defendant towards him, and that a less hostile attitude might have avoided the difficulty and lead to more peaceful results.

Neither the conduct of the warden or the defendant can be commended, and whilst the evidence has convinced us of the technical guilt of the defendant, we do not feel as though under all the circumstances as disclosed by the evidence we should impose upon the defendant so large a penalty of one hundred dollars and costs, yet the act imposes no other penalty, nor have we any discretion as to the amount of the penalty. We are inclined, however, to follow the case of *Comm. vs. Souder*, above referred to, which was a case very much like the one in hand. The costs of the case including the costs of the witnesses will be considerable, and the payment of this alone we are satisfied will admonish the defendant of being more careful in the future and to keep better control of his temper in dealing with the officers of the law.

If, therefore, the defendant pays the costs within ten days, we will enter a judgment sustaining the appeal. If the costs including the costs of the witnesses and the costs of subpoenaing the same are not paid within that time by the defendant, the appeal will be dismissed and the sentence of the Justice will then be ordered executed.

By the Court.

WILLIAM W. HART, *P. J.*

January 12, 1911.

APPEALS IN SUMMARY CONVICTION.

Several months ago Charles A. Spotts was arrested in Perry county on the charge of maintaining a fish basket in Sherman's Creek in Perry county which did not conform with the provisions of the Act of May 1, 1909. After a hearing before a Justice of the Peace the defendant was discharged. From this decision the Commonwealth appealed alleging that the Justice disregarded the evidence, the provisions of the law, and was under coercion or duress. The motion for the allowance for appeal was heard by Judge James W. Shull, who discharged the prisoner in an opinion in which he claimed that the Commonwealth did not have the right to appeal in cases of summary conviction where the defendant was acquitted. The Commonwealth took an appeal from this decision on the ground that the term, summary conviction, was intended to refer to cases of summary proceeding, and that if it meant otherwise it would be impossible to obtain justice at the hands of ignorant or corrupt Justices. The Superior Court sustained the Perry County Court in so far that the matter of granting the appeal was one within the discretion of the court, but says decidedly at the end of the opinion that it does not sustain the views of the court in regard to the allowance of the appeal where the defendant was discharged by the magistrate. This point the Superior Court says was not before them and therefore no ruling will be made. The following is the opinion of the court:—

IN THE SUPERIOR COURT OF PENNSYLVANIA.

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| Commonwealth of Pennsylvania | } | No. 24 March Term 1910; Appeal from Court of Quarter Sessions of Perry county. |
| vs. | | |
| Charles A. Spotts. | | |

OPINION BY PORTER, J.

The record as printed in the paper book of the appellant is incomplete, in that it entirely fails to show the transcript of the proceedings before the magistrate, which resulted in the judgment from which the Commonwealth sought to appeal. The only parts of the record which are printed, are information and the petition, to the court below, for the allowance of an appeal from the judgment of the magistrate; from which we gather the following facts: The defendant was charged before the magistrate, in a summary proceeding, with a violation of the Act of May 1, 1909, P. L. 353, entitled "An Act to classify the fish in the waters within this Commonwealth * * * and to regulate the catch and sale and encourage the propagation of the same, &c." The defendant appeared before the magistrate and was, after a hearing, discharged. The prosecutor, on behalf of the Commonwealth, then presented a petition to the court below praying for the allowance of an appeal to the Court of Quarter Sessions. That court made an order refusing to allow the appeal, which order is here assigned for error.

The nature and limits of our jurisdiction to review the action of the court below in refusing to allow an appeal from the judgment of a magistrate, in a proceeding for the summary conviction of a defendant, have been well defined by both this and the Supreme Court. Neither Article V. Sec. 14 of the Constitution nor the Act of April 17, 1876, P. L. 29, which was passed to carry it into effect, contemplates that an appeal should be allowed merely because the party praying for it is dissatisfied with the result of the trial before the magistrate, as is the case with most defeated litigants. The purpose of the constitutional provision and of the statute was to vest in the court to which the petition for the allowance of an appeal from the judgment of the magistrate must be presented, a discretion to determine whether the appeal should or should not be allowed. The Court of Quarter Sessions being thus vested with discretion in this matter, its action should only be reversed where an abuse of discretion clearly appears. The appeal to this court, in these statutory proceedings, is in the nature of a certiorari, and in considering it we cannot go outside of the record. An appeal from judgment of a magistrate in a summary conviction should not be allowed save for cause shown, and the cause should be stated in the petition; *McGuire vs. Shenandoah*, 109 Pa. 613; *Comm. vs. Eichenberg*, 140 Pa. 158; *Comm. vs. Menjou*, 174 Pa. 25. Judge Wickham who spoke for this court in *Thompson vs. Preston*, 5 Pa. Superior Ct. 154 and *Comm. vs. Hendley*, 7 Pa. Superior Ct. 356, said, referring to the allowance of appeals by the Courts of Quarter Sessions, "Ordinarily an appeal should not be permitted, if the party desiring it has had an opportunity to fully and fairly present his case before the magistrate, unless a doubtful legal question is involved, or there is something to indicate oppression, cor-

ruption or disregard of law on the part of the magistrate, or after discovered evidence which should justify a new trial, under the well known rules relating to new trials for that cause."

We must, therefore, turn to the petition, which the appellant presented to the court below, to ascertain whether the reasons there set forth for the allowance of an appeal were of such a character as to make it evident that the refusal of the appeal involved an abuse of discretion upon the part of the court. The petition alleged three reasons for the allowance of the appeal. (1) That the magistrate grossly and wantonly disregarded the evidence adduced on the part of the Commonwealth. (2) That the magistrate grossly and wantonly disregarded the provisions of the said act of assembly. And (3) That from statements made by said magistrate "to others before the time fixed for the hearing and to your petitioner and others after said hearing, it appeared to your petitioner that the said justice of the peace was under coercion or duress by some person or persons, to your petitioner unknown and in favor of the said Charles A. Spotts." We are unable to say that these allegations were of such a character as to render the refusal of the appeal an abuse of discretion upon the part of the court below. The first reason amounts to no more than an assertion that the opinion of the petitioner, as to the facts established by the evidence, differed from that of the magistrate, the petitioner made no attempt to fortify his opinion by stating what evidence had been produced, or whether any evidence had been produced, which would have warranted the magistrate in convicting the defendant. The second reason was no more than an assertion that the opinion of the petitioner, as to the law, differed from that of the magistrate. He made no attempt to aver what the law was or what the magistrate had held it to be. The third reason was simply an averment that, in the opinion of the petitioner, from what he had heard from others and from what the magistrate had afterwards said to him, he believed the magistrate was under coercion or duress. Here again he utterly failed to set forth the ground upon which his opinion was based. Reduced to its legal value, the petition simply asserted that in the opinion of the petitioner the magistrate had made a mistake as to the facts and as to the law and that he had been under some sort of duress. This petitioner was not the person in whom the law had vested the discretion to determine whether an appeal should be allowed in this case, his opinion was not that which was to govern. He ought to have set forth the facts upon which his opinion was founded, and the court would then have been in possession of the information which would enable it to act in the manner contemplated by law. The specification of error must be dismissed.

We deem it proper to say that this disposition of the case is not to be construed as an adoption of the views expressed in the opinion of the learned judge of the court below, which is not a part of the record proper, as to whether the Court of Quarter Sessions has jurisdiction to allow an appeal, upon the petition of the Commonwealth, when in a proceeding for summary conviction the defendant is discharged by the magistrate. Whether the Court of Quarter Sessions has jurisdiction, under the constitutional provision and the statute,

to allow an appeal by the Commonwealth, can be determined when a defendant is convicted in the Court of Quarter Sessions after having been discharged by a magistrate. It is not in this case necessary to express an opinion upon that question.

The order appealed from is affirmed; the costs to be paid by the appellant.

Opinion filed March 3, 1911.

THE RIGHT TO USE SUPERFLUOUS WATER.

When the state purchased the property at Spruce Creek in Huntingdon county for hatchery purposes the seller, Sidney T. Isett, reserved in the deed the right to the full flow of the water of Spruce Creek through his head-race which runs through the hatchery ground, the dam on the creek being on the hatchery grounds.

A year or two ago it was contemplated to erect a plant for grinding the meat at the hatchery the power to be taken by a pipe from the creek. Mr. Isett then asked the court of Huntingdon county to issue an injunction restraining the Commissioner from using the water of the creek on the ground that it was a violation of the reservation in the deed. The Court of Huntingdon county granted the injunction asked for, but made it still stronger by enjoining the Commissioner from taking any water from the creek for any hatchery purposes even though the water should be returned to the creek above the dam. The Commissioner took an appeal from this to the Supreme Court, which in an opinion delivered by Justice Brown decided that the injunction so far as it prevented taking any water which would interfere with the flow of the water in the race was all right, but declared that the Lower Court was inconsistent when it said no water could be used from the creek when the taking of such water could in no wise interfere with the water power of the mill. The Supreme Court therefore modified the decree of the Huntingdon county court in-so-far that the Commissioner can now use all the water of Spruce Creek he desires so long as the flow of water through the race is not interfered with. The following is the opinion of the Court:

IN THE SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT.

Sidney T. Isett

vs.

William E. Meehan, Commissioner of Fisheries, William E. Meehan individually, William Hass, John Miller, William Miller, Scott Meyer, Jacob Harpster, and Sidney Barrick.

No. 323 January Term 1910.
Appeal from C. P. Hunting-
ton.

Filed July 6, 1911.

BROWN, J.

By deed dated January 29, 1906, Sidney T. Isett, the appellee, conveyed to the Commonwealth, for the use of the Department of Fisheries, 27 acres and 20 perches of land near the village of Spruce Creek in Huntingdon county, the land conveyed including the stream of Spruce Creek. On this land the State has erected a fish hatchery plant. A grist mill and dam of the appellee are located further down Spruce Creek at a point about 200 feet from the southern line of the Commonwealth's property. The race for this mill leaves Spruce Creek at the breast of the appellee's dam and is included within the boundaries of the hatchery property for nearly its entire length. In the conveyance from the appellee to the Commonwealth there is the following reservation: "And reserving further from this conveyance the right to the uninterrupted and perpetual flow of the water of Spruce Creek into and through the said head race from the western course of Spruce Creek to the Isett grist mill at Spruce Creek at the same height, width, depth and capacity as now constructed, used and maintained, to furnish water and power to said grist mill. The appellee filed his bill in the court below, averring that the Commissioner of Fisheries had directed the digging of trenches or ditches to connect the mill dam of the appellee and Spruce Creek with a proposed feed mill on the hatchery plant for the purpose of operating that mill by water power, and that by so doing the said commissioner was violating the reservation in the deed and working irreparable injury to the appellee. The workmen under the commissioner were made defendants with him. The court below having found that what he proposed to do would, if carried out, divert a large quantity of water from the mill race which conveys the water to the complainant's mill, and thereby seriously impair and work irreparable injury to the water power at the mill, awarded the injunction appealed from, which restrains and enjoins the appellants "from diverting any water from the stream of Spruce Creek by pipes, trenches, drains or otherwise, so that the same cannot pass into and through the race leading to the grist mill of the complainant or from doing any other act or acts whatsoever that would carry from said stream of Spruce Creek any water that would otherwise pass down the stream to and through the mill race connected with the grist mill, or interfere in any way with the water power belonging to the complainant or doing any other act

or acts whatsoever that would in any way injure or interfere with the water or the said stream of Spruce Creek belonging to the complainant, and which is appurtenant to his said grist mill."

This proceeding is not against the commonwealth, and the Williamsport and Elmira Railroad Company et al v. The Commonwealth et al. 33 Pa. 288, is not authority for the contention of the appellant that the bill ought to have been dismissed for want of jurisdiction in the court to entertain it. While it is against Meehan in his official capacity as fish commissioner, it is not to enjoin him for discharging any official duty imposed upon him by statute, but is to prevent his performing what is to be regarded as a mere ministerial duty under the general powers and discretion conferred upon him, and if in doing so he defies a covenant between the State and the appellee, he cannot shield himself under the plea that the State is being sued.

The manifest and sole purpose of the reservation was to preserve undiminished to the appellee the water power at his mill. The land which he conveyed to the Commonwealth included so much of Spruce Creek as runs through it, and on the banks of that stream, within the boundaries of the Commonwealth's land, the fish commissioner would divert the waters of the stream for the purpose of supplying a need of one of the State's fish hatcheries. In doing so he did not propose to divert the water permanently from the creek, but, according to his testimony, intended to return it to the stream above the breast of the dam. The return of the water, however, to the creek, whether above or below the dam, is not material in passing upon the right of the appellee to the sweeping injunction decreed by the court below.

The purpose of the reservation in the deed, as already stated, was the preservation of the mill's water power as it existed at the time the conveyance was made. The water was to continue to flow interruptedly and perpetually through the race as it was then constructed, "in height, width, depth and capacity," to furnish water and power to the mill. Equity will not permit the purpose of the reservation to be defeated, and if, as a matter of fact, irreparable injury would result to the appellee, as he avers in his bill, by permitting the fish commissioner to do what he purposes to do, a chancellor will protect him in his rights. On the other hand, if what the commissioner proposes to do, or what he ought to be permitted to do, will not in any degree interfere with or impair the water power conveyed to the mill through the race, the appellee will sustain no injury and the patent purpose of the reservation will not be interfered with. So long as the water flows over the dam the power to run the mill passes down the race, and the purpose of the fish commissioner was to take water from the stream only when it was running over the top of the dam. This the court below ought to have found from Meehan's uncontradicted testimony, and the further finding ought to have been that he did not intend to draw water from the stream when it was below a mark that he had ordered his superintendent to place at the head of the race. If the water is taken from the stream only when these conditions exist, how can it be said that the appellee will suffer any injury? Though the unimpaired water power passing down the race will continue to drive the wheels of his mill, he asks that the appellants be enjoined from doing that which can do no harm to him and will do good to the State, and he asks this because, he insists, it is so nominated in

the bond. Even the cold eye of the law cannot so read it, and equity surely will not so construe it. The court below properly found, upon the request of the appellants, that "the commonwealth has the right to the ordinary use of the water of Spruce Creek for the purpose of supplying the natural wants of her Spruce Creek hatchery, located on the lands purchased from the plaintiff, provided she does not violate the covenant in said deed with reference to the flow of water in the raceway." but an inconsistent decree followed this finding, sustaining the contention of the appellee that the reservation prevents the use by the State of the waters of the stream above the breast of the dam under any condition. That decree must be modified, and we do now modify it by ordering, adjudging and decreeing that the appellants are enjoined from diverting any water from the stream of Spruce Creek by pipes, trenches, drains or otherwise only when the waters of the said creek are not running over the top of the dam; one-half of the costs below and on this appeal to be paid by the appellants and the remaining half by the appellee.

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